STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2011
v	No. 294223 Wayne Circuit Court
JERMOND LAWRENCE PERRY, Defendant-Appellant.	LC No. 03-011974-FC

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree, premeditated murder, MCL 750.316(1)(a), two counts of first-degree, felony-murder, MCL 750.316(1)(b), one count of being a felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder convictions, three to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. EXTRINSIC INFLUENCE ON JURY

Defendant first argues that he is entitled to a new trial because ex parte communications allegedly occurred between the officer in charge and the jury. We disagree. While a trial court's factual findings are reviewed for clear error, its decision to deny a motion for a new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* A trial court abuses its discretion when it chooses an outcome that falls outside the principled range of outcomes. *Id.*

At the outset, we note that defendant relies on *People v France*, 436 Mich 138; 461 NW2d 621 (1990), to argue that he was prejudiced. However, defendant's reliance is misplaced because *France* addressed ex parte communications between *the trial court* and a *deliberating* jury which is prohibited under MCR 6.414(B). *Id.* at 142-144. Neither of these factors is present in the instant case. Rather, defendant alleges that the officer in charge had ex parte contact with the jurors after the jury was selected but before opening statements were presented. Accordingly, the situation defendant alleges is more properly characterized as an extrinsic influence on the jury.

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. [*People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997) (citations omitted).]

Here, two witnesses, Nicole Beedle, a co-worker, and defendant's mother, Jill Perry, testified at a post-trial evidentiary hearing that the officer in charge allegedly gathered the jurors at the end of the hallway outside the courtroom and escorted them into a separate room for up to ten minutes. Ultimately, the trial judge found the witnesses' accounts to be incredible and he denied defendant's motion. After our review of the record, we cannot disagree with his conclusion. Both witnesses misidentified the officer as Officer "Menendez,"[1] although Jill testified that she had obtained the officer's business card. Neither witness heard what, if anything, the officer said to the jurors. Jill thought the trial lasted two months, when it only lasted four days. Jill also thought that the officer in charge was the only witness who testified at trial, when there were actually 16 witnesses. Jill further testified that, by the time she and her family entered the courtroom several minutes after seeing the jurors and the officer in charge enter into this other room, Officer "Menendez" was already seated at the prosecutor's table.

Regarding Beedle's testimony, even though she said she attended every day of trial, she stated that she was not sure if Officer "Menendez" testified at the trial.[2] Additionally, Beedle was not sure if these "jurors" were even wearing juror badges and she changed her story while testifying. Initially, Beedle said that the next time she saw the jurors, after they entered the room with Officer "Menendez," was when they entered the courtroom through the jury room door. But later, Beedle stated that she saw the jurors enter the courtroom through the regular entrance, then enter the jury room, before exiting out of that jury room door. "[I]f resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, [reviewing courts should] defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000). Thus, given the credibility concerns raised through the witnesses' testimony, the trial court was within its right to deem the testimony unreliable and we should not disturb its findings. *Sexton*, 461 Mich at 752. Accordingly, defendant failed to establish that the jury was exposed to any extraneous influence. The trial court did not abuse its discretion by denying defendant's motion for a new trial.

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[1] The officer in charge's name was Officer Moises Jimenez.

[2] Officer Jimenez did testify at trial.

II. *BATSON*[3] OBJECTION

Defendant next argues that he is entitled to a new trial because the prosecutor allegedly discriminated against three black members of the jury pool when he used peremptory challenges to remove them from the jury pool. We disagree. A *Baston* challenge presents mixed questions of fact and law that we review under the clearly erroneous and de novo standards, respectively. *People v Knight*, 473 Mich 324, 342-345; 701 NW2d 715 (2005).

The Equal Protection Clause of the Fourteenth Amendment prohibits a party from exercising peremptory challenges to remove a prospective juror solely on the basis of the person's race. *Knight*, 473 Mich at 335. The party opposing a peremptory challenge must make a prima facie showing of discrimination. *Id.* at 336, citing *Batson v Kentucky*, 476 US 79, 96; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Once a party establishes a prima facie case the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral basis for the challenge. *Knight*, 473 Mich at 337. If the proponent provides a race-neutral explanation, the trial court must then determine whether the opponent of the challenge has proved purposeful discrimination. *Knight*, 473 Mich at 337-338. The establishment of purposeful discrimination "comes down to whether the trial court finds the . . . race-neutral explanations to be credible." *People v Bell*, 473 Mich 275, 283; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005), quoting *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003).

Here, defendant contends that the trial judge erred by failing to perform this *Batson* analysis for all three black jurors that were peremptorily dismissed. However, at trial, defendant only objected to the last one dismissed, juror Holley:

> Your Honor, the *only issue is I was challenging the release of Loretta Holley by the prosecutor*. She was the third African American. In fact, the third African American female that the prosecutor released.
>
> At that point in time he only had one other individual that he had released, and that was Mr. Mero.
>
> So that's why I'm making a challenge because he had released two other African Americans at the time he released Ms. Holley. [Emphasis added.]

Consequently, the prosecutor only provided an explanation for his decision to use a peremptory challenge on Holley. The trial court, as well, only focused on the use of a challenge on Holley. At no time did defense counsel object to the lack of discussion involving the other two jurors. Accordingly, we conclude that defendant has waived his argument on appeal that the trial court

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[3] *Batson v Ky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

erred by not applying the *Batson* analysis with respect to the other two jurors. See *Knight*, 473 Mich at 346-347. Defendant's *Batson* claim fails.[4]

III. EVIDENTIARY RULINGS

Defendant next claims that several evidentiary errors deprived him of a fair trial. A trial court's decision to admit evidence is reviewed for a clear abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). To the extent that defendant's arguments are unpreserved, our review is for plain error affecting substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Reversal for unpreserved matters is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

A. OUT-OF-COURT STATEMENTS OF JAMES

Defendant first contends that the trial court abused its direction when it admitted a statement that the murder victims' six-year-old son, James, made to Officer Gina Gallow because it did not qualify as an excited utterance. We disagree. MRE 803(2) provides an "excited utterance" exception to the bar on hearsay: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." There are two primary requirements for a statement to be admissible under the excited utterance exception: "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). "It is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Id.* at 551.

James made the complained of statements to Officer Gallow the day after the murders. Officer Gallow was the first to respond to the scene and James indicated to her that armed men stormed into the house and led his parents by gunpoint into the basement. According to Officer Gallow, James said that he later heard nearly two-dozen gunshots. Certainly, given the lapse of time between James' statements and the shootings, the question whether his statements constituted excited utterances presents a close evidentiary question. However, under the circumstances, we cannot conclude that the trial court abused its discretion by admitting James'

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[4] We note that *Knight* does direct courts to apply the *Batson* analysis to all strikes in an alleged pattern, even if the prior strikes were not specifically objected to earlier. *Knight*, 473 Mich at 346. However, after our review of the record, we can discern no pattern of strikes evincing a prima facie showing of discrimination.

out-of-court statements. Given James' demeanor at the time he made the statements, it is a reasonable conclusion that he was still under the stress of perceiving his parents' murders. Although Officer Gallow testified that James was calm but fearful, several other testimonies indicated that he was crying and frantic. Further, contrary to defendant's argument, the startling event includes the entire event, from the moment the gunmen entered the house, to the gunshots being fired, and arguably until the police arrived at the scene the next day. Because a trial court's determination of whether a declarant's statement was made while under the stress of an event is given "wide discretion," this Court will defer on these close calls. *Id.* at 552; see also *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995) (stating that a trial court's decision on a close evidentiary question cannot be an abuse of discretion). Accordingly, the trial court did not abuse its discretion when it found that James's statement to Officer Gallow qualified as an excited utterance exception to hearsay.[5]

B. STATEMENTS MADE BY CODEFENDANTS, YOUNG AND HAMILTON

Defendant also argues that he is entitled to a new trial because hearsay statements made by the two codefendants, Young and Hamilton, were permitted into evidence. Specifically, with respect to Young, defendant takes issue with three statements: (1) Young hoped that the people inside the victims' home were dead, (2) Young was going to take the shotgun home, and (3) Young believed that defendant shot Young's hand. Similarly, defendant contends two statements made by Hamilton constituted impermissible hearsay: (1) Hamilton stating that "it was a bullshit lick"[6] and (2) Hamilton saying that he shot the female victim. Defendant did not object to the admission of any of these statements at trial.

Generally, hearsay is inadmissible. MRE 802. But not all out-of-court statements are hearsay; only statements that are offered to establish the truth of the matter asserted are hearsay. MRE 801; *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). Moreover, even if a statement is hearsay, it may be admissible under one of the exceptions to the hearsay rule. See MRE 803; MRE 804.

Here, Young's first two statements fall under the then existing state of mind exception to hearsay, MRE 803(3), which states

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[5] We note that to the extent that it was error to admit the statement, any error was harmless. Evidentiary error does not warrant reversal unless it involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was not outcome determinative. *People v Moorer*, 262 Mich App 64, 74; 683 NW2d 736 (2004). Given that James's statement to Officer Gallow did not introduce anything new for the jurors, we do not believe any evidentiary error was outcome determinative.

[6] There was testimony presented that a "lick" is slang for robbing or breaking into somebody's house.

> A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation identification, or terms of declarant's will.

Clearly, Young stating that he wished that the people were dead conveyed Young's then existing state of mind. Similarly, Young stating that he was going to take the shotgun home also conveyed his then existing state of mind or his plan at the time. As a result, these statements were hearsay, but fell under a recognized exception to hearsay and were admissible. *Moorer*, 262 Mich App at 68-69. Defendant has failed to demonstrate any error with respect to the admission of these statements.

With regard to Young's third statement, we are of the view that it was not offered to prove the truth of the matter asserted, i.e., that defendant shot Young's hand. When viewing the statement in the context of prosecution's examination, it is clear that the prosecutor did not ask the question to determine whether defendant was the actual cause of Young's injury. Rather, the statement was offered merely to show that defendant was present at the shooting. Thus, the statement was not hearsay and was not excludable. See *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). We are of the same opinion with regard to Hamilton's statements describing the incident as a "bullshit lick" and indicating that he shot the female victim. Again, the prosecutor did not introduce these statements to prove the truth of the matters asserted therein. Rather, the prosecutor introduced the testimony to show the individuals' roles in the altercation and to put into context defendant's own admission that he was there and was "just shooting." Accordingly, none of these statements constituted impermissible hearsay. Defendant has failed to show that any error occurred with regard to the admission of these statements. Accordingly, defendant's claim fails.

V. NEWLY DISCOVERED EVIDENCE

Finally, defendant argues that the trial court erred by denying his motion for a new trial, which was based on newly discovered evidence. Specifically, the motion asserted that codefendants Young and Hamilton would testify that defendant was not involved in the murders. We disagree. As noted, we review a trial court's decision on a motion for a new trial for an abuse of discretion, while its findings of fact are reviewed for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

In order to obtain a new trial on the basis of newly discovered evidence, a defendant must show the following: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Id.* at 692 (internal quotations omitted).

Here, the testimonies of Young and Hamilton are not newly discovered evidence. Rather, their testimonies were merely newly available. This Court recently addressed the same issue defendant now raises in *People v Terrell*, ___ Mich App ___; ___ NW2d ___ (2010). The Court held:

> [W]hen a defendant knew or should have known that his codefendant could provide exculpatory testimony, but does not obtain that testimony because the codefendant invokes their privilege against self-incrimination, the codefendant's post-trial statements do not constitute newly discovered evidence, but merely newly available evidence. [*Id.*]

By the time defendant's trial started, Young and Hamilton had already pleaded guilty. Accordingly, defendant knew or should have known that, since Young and Hamilton were claiming responsibility for the crimes, they could have offered material testimony regarding defendant's role in the charged crimes. Defendant's argument that Young and Hamilton could have chosen to not testify, by claiming their rights against self-incrimination, is of no consequence.[7] See *Terrell*, ___ Mich App at ___ (slip op at 9-10). Accordingly, defendant cannot meet the first element in the four-part test established in *Cress*, 468 Mich at 692, that the evidence be "newly discovered." The trial court did not abuse its discretion by denying defendant's request for a new trial.[8] Defendant's claim fails.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens

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[7] We note that, although the plea agreement that Young and Hamilton entered into prevented the prosecution from compelling them to testify against defendant, the agreement did not prevent them from testifying on their own volition.

[8] We also reject defendant's related argument that defense counsel's performance was deficient for failing to discover the allegedly exculpatory testimonies of Hamilton and Young. Even assuming counsel's performance fell below the objective level of professional norms, defendant cannot demonstrate prejudice. Overwhelming evidence supported defendant's convictions and Hamilton and Young's testimonies would be inherently suspect, *Terrell*, ___ Mich App at ___. Thus, there is no reasonable likelihood that but for counsel's error the result of the proceedings would have been different.